STATE OF MICHIGAN

COURT OF APPEALS

MEGA DYNAMICS, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

HANDLEMAN COMPANY,

Defendant-Appellee/Cross-Appellant,

and

TELXON CORPORATION,

Defendant-Appellee.

UNPUBLISHED
July 21, 2000

No. 211967
Oakland Circuit Court
LC No. 91-414593-CZ

Before: Kelly, P.J., and Holbrook, Jr. and Collins, JJ.

PER CURIAM.

Mega Dynamics, Inc. (Mega), filed this action against Handleman Company (Handleman), for breach of an alleged contract to purchase hand-held, computerized scanners. Mega also brought a claim against Telxon Corporation (Telxon) for tortious interference with contract or business relationship. The circuit court granted summary disposition to both defendants and Mega appealed. This Court held that the circuit court erred in ruling that Handleman was not a merchant for purposes of the Uniform Commercial Code (UCC) statute of frauds confirmatory memorandum provision and, therefore, dismissing Mega's breach of contract claim on the basis that it was barred by the UCC statute of frauds. This Court also found that the circuit court erred in dismissing, pursuant to MCR 2.116(C)(8), Mega's claim of tortious interference on the basis that it had dismissed Mega's breach of contract claim and that plaintiff failed to plead improper conduct on the part of Telxon.

On remand, the circuit court granted summary disposition for both defendants pursuant to MCR 2.116(C)(10). Mega appeals as of right. Handleman appeals the trial court's denial of mediation sanctions. We affirm.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, admissions, depositions, and other documentary evidence in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In *Quinto, supra,* our Supreme Court elaborated on the standard for reviewing motions for summary disposition when brought under MCR 2.116(C)(10):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Id.* at 362-363. Citations and footnote omitted.]

The UCC statute of frauds provides that all contracts for the sale of goods valued at $500 or more must be in writing and signed by the party to be charged. MCL 440.2201(1); MSA 19.2201(1). Mega argues that its oral contract with Handleman for the purchase of at least one hundred scanners is enforceable pursuant to MCL 440.2201(2); MSA 19.2201(2), which allows a confirmatory writing between merchants to remove the statute of frauds bar to enforcement. Mega maintains that the three confirmatory letters it sent to Handleman are sufficient to satisfy the statute. We disagree.

Section 2201(1) requires that there be a writing "sufficient to indicate that a contract for sale has been made between the parties." Although most of the material terms of the contract may be omitted from a confirmatory writing offered pursuant to § 2201(2) in satisfaction of the requirements of § 2201(1), the law clearly requires that the writing specify a quantity term. *Lorenz Supply Co v American Standard, Inc,* 419 Mich 610, 614-616; 358 NW2d 845 (1984). The three letters that Mega offers contain varying quantity terms. The only quantity that appears to be agreed upon is for Handleman to purchase ten scanners, with the possibility of purchasing additional scanners in the future. Moreover, whether defendant would purchase more scanners in the future was contingent on the results of its tests of the initial ten. The presence of "a condition precedent in a writing which contains no indication that the condition has been performed will make that writing insufficient under the statute of frauds." 2 Williston on Sales (5th ed), § 14-81, p 237. See also White and Summers, Uniform Commercial Code (4th ed), § 2-4, p 52. We conclude, therefore, that the confirmatory letters, when read collectively, are insufficient to satisfy the requirements of § 2201(2).

Mega argues next that the trial court improperly granted summary disposition, pursuant to MCR 2.116(C)(10), to Telxon on Mega's claims of tortious interference with a contract or business relationship. Mega contends that the trial court's grant of summary disposition with regard to Mega's

claim of tortious interference with a contract is contrary to this Court's earlier ruling that the trial court could not dismiss Mega's tortious interference with a contract claim on the ground that the alleged contract is unenforceable. While the trial court stated on remand that it granted summary disposition because there was no enforceable contract between the parties, we need not decide if the court's conclusion was contrary to our earlier opinion. Because plaintiff failed to raise a genuine issue of material fact with regard to whether defendant engaged in wrongful conduct of the sort necessary to support a claim of tortious interference, we conclude that the trial court reached the correct result. See *General Aviation, Inc v Capital Region Airport Authority (On Remand)*, 224 Mich App 710, 716; 569 NW2d 883 (1997).

This Court held in *Feldman v Green,* 138 Mich App 360, 369-370; 360 NW2d 881 (1984) that

> one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship. Under the latter instance, plaintiff necessarily must demonstrate, with specificity, affirmative acts by the interferor which corroborate the unlawful purpose of the interference.

See also *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 779; 421 NW2d 289 (1988). A "per se wrongful act" is an act that is inherently wrongful or one that is never justified under any circumstances. *Id*. at 780. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996).

Relying on 15 USC 13a, Mega argues that Telxon's pricing was predatory in nature and, therefore, per se wrongful. In *Brooke Group Ltd v Brown & Williamson Tobacco Corp,* 509 US 209; 113 S Ct 2578; 125 L Ed 2d 168 (1993), the United States Supreme Court articulated the requirements for recovery on a claim of predatory pricing under § 2 of the Sherman Anti-Trust Act, 15 USC 1 *et seq.*, or primary-line price discrimination under the Robinson Patman Act, 15 USC § 13a. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* at 222. Second, the plaintiff must demonstrate "that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224. This Court has addressed predatory pricing under Michigan's antitrust laws, which are patterned after the federal statutes. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 397; 516 NW2d 498 (1994). "A firm engages in predatory pricing where it 'foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits.'" *Id.*, quoting *Janich Bros, Inc v American Distilling Co*, 570 F2d 848, 856 (CA 9, 1977).

In this case, it is undisputed that Telxon's prices were not below its cost. Telxon presented evidence that its scanners were manufactured at a cost below $1,200 and that the net price to

Handleman was $1,470 per unit. Mega offered no evidence that Telxon was foregoing profits in its sales to Handleman. Although Mega contends that above-cost pricing may be predatory where the defendant engages in price discrimination for the purpose of eliminating competition, see 15 USC 13a, Mega has produced no evidence that Telxon engaged in price discrimination by offering prices to Handleman that it did not offer to its other customers. See also *Brown, supra* at 223 ("we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws"). Because Mega failed to present evidence that Telxon's pricing practices were unjustified or done with the unlawful purpose of interference, and because it otherwise failed to offer documentary evidence of "wrongful conduct" to establish a genuine issue of material fact, summary disposition was warranted.

On cross-appeal, Handleman argues that the trial court erred in denying its motion for mediation sanctions. We review de novo a trial court's decision whether to grant mediation sanctions pursuant to MCR 2.403. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

The trial court stated that Handleman was not entitled to mediation sanctions on the basis of Mega's rejection of the 1992 mediation award because Mega's breach of contract claim was not included in its original complaint, but was added by amendment following this Court's ruling on appeal. Both parties acknowledge that this is an incorrect statement of the facts and that Mega's breach of contract claim was part of its original complaint. However, because we conclude that the court reached the correct result, albeit for the wrong reason, reversal is not required. *General Aviation, supra* at 716.

Relying on *Joan Automotive Industries, Inc v Check*, 214 Mich App 383, 386-387; 543 NW2d 15 (1995), Handleman maintains that the breach of contract claim was included and evaluated in the 1992 mediation, notwithstanding the fact that summary disposition had been granted with regard to that claim prior to mediation. Thus, contends Handleman, pursuant to MCR 2.403(O), it is entitled to actual costs incurred in defending against Mega's breach of contract claim, because Mega rejected the 1992 mediation award. However, we find this case distinguishable from *Joan Automotive*. In *Joan Automotive*, this Court stated the question presented and its holding as follows:

> Where the parties accepted a mediation award, may defendant appeal the prior summary disposition of fewer than all claims alleged in his counterclaim, or are the claims deemed to have been incorporated into the mediation award? After careful review of the relevant court rules and case law, we conclude, in accordance with *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), that "absent a showing that less than all issues were submitted to mediation, a mediation award covers the entire matter and acceptance of that mediation award settles the entire matter." Because defendant has not shown that fewer than all issues were submitted to mediation in the present case, he may not now appeal the prior summary disposition of the disputed claims. [*Id.* at 386-387.]

In *Joan Automotive*, this Court noted that the plaintiff took no action to exclude the previously dismissed claims from mediation. *Id.* at 389. Indeed, in its mediation summary, the plaintiff "expressly

requested that the dismissed counts of defendant's counterclaim 'be mediated at zero dollars.'" *Id.* at 389 n 3. Here, both parties explicitly acknowledged in their mediation summaries that mediation was limited to consideration of Mega's promissory estoppel claim. Accordingly, we conclude that the trial court did not err in denying Handleman mediation sanctions.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey G. Collins